Ishak bin Hj Shaari v Public Prosecutor

HIGH COURT (MELAKA) — CRIMINAL APPLICATION NO 44-3 OF 1997
SURIYADI J
7 MARCH 1997

Criminal Procedure *— Appeal — Time limits for, principles governing — Application for enlargement of time — Exercise of discretion of the court to extend time for filing of petition of appeal — Whether solicitor's incompetency was good ground for court to give an enlargement of time — Whether service of grounds of decision on former solicitors of applicant amounted to sufficient service under s 307(iii) of the Criminal Procedure Code (FMS Cap 6) — Whether delay in filing application for enlargement of time was inordinate — Criminal Procedure Code (FMS Cap 6) ss 307(iii), (iv) & 310*

The applicant was sentenced to 15 years' imprisonment and six strokes of the rotan. Pursuant to s 307(iv) of the Criminal Procedure Code (FMS Cap 6) ('the CPC'), the applicant was to lodge a petition of appeal to the High Court within 10 days of receipt of the grounds of decision. However, much to his detriment, this was not done. Counsel for the applicant applied for an enlargement of time pursuant to s 310 of the CPC. The deputy public prosecutor objected to the application and argued that a solicitor's incompetency was not a good ground for the court to give an enlargement of time. The applicant submitted strong grounds of his appeal on merits or in law and further argued that the inadvertence of his solicitors was due to a climate of uncertainty when he had a change of solicitors. Evidence before this court showed that on 12 December 1996, the court appealed from, which was not informed of the change of solicitors and acting on its old records sent the grounds of decision to the address of the applicant's former solicitors ('the former solicitors'). The applicant's new solicitors ('the applicant's solicitors') only received the grounds of decision on 2 January 1997. On 31 January 1997, the applicant's solicitors filed this application. The issue was whether the provisions of s 307(iii) of the CPC had been strictly complied with.

Held, allowing the application:

(1) Section 310 has conferred on the court powers to extend the time for filing the petition of appeal in order that substantial justice may be done. The powers are purely discretionary and no hard and fast rule should be laid down for its exercise except for the sole purpose of meting out substantial justice. In fact, with the exception of doing substantial justice, it may be legally wrong to curb and fetter the discretion of the judge in the exercise of his discretion under s 310 of the CPC (see p 33G–H); *Innocent v PP* [1971] 1 MLJ 294 and *Veerasingam v PP* [1958] MLJ 76 followed.

(2) There was no deeming provisions that provided sufficiency of service on the advocates on record merely by leaving the relevant documents at the last known address as provided in the notice of appeal despite its outdatedness (ie regardless of the status of the solicitors on record). Construction wise, s 307(iii) speaks of service

A to 'his advocates', but in this case, the applicant's solicitors who were 'his advocates' were not supplied with the documents.

Therefore, when the court sent the grounds for decision to the former solicitors instead of the applicant's solicitors, it was not conclusive that s 307(iv) of the CPC had been complied with.

B

In the event the above subsection had not been complied with, time thus had not begun to run (see pp 35E–F and 38E–F).

(3) The inadvertence and incompetence of solicitors could be a ground of consideration for a judge when exercising his discretion in allowing or disallowing the application. Grounds for appeal has to be looked into as well (see pp 36I and 38F); *Sinnathamby & Anor v Lee Chooi Ying; Brijkishore & Anor v Lee Chooi Ying* [1987] 1 MLJ 110 and *Soh Keng Hian v American International Assurance Co Ltd* [1996] 1 MLJ 191 followed; *Jumari bin Mohamed v PP* [1982] 1 MLJ 282 and *Masnelan Pakpahan v PP* [1989] 2 MLJ 362 distinguished.

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(4) Having considered the administrative gymnastics that the applicant's solicitors had to go through prior to filing the petition — particularly the process of obtaining the relevant information before submitting the motion on 31 January 1997 — supported by other satisfactory reasons, the supposed delay of 27 days in this case after considering all the circumstances could not be construed as inordinate (see p 38D,G).

E

[Bahasa Malaysia summary

F Pemohon telah dijatuhkan hukuman penjara 15 tahun dengan enam sebatan rotan. Mengikut s 307(iv) Kanun Acara Jenayah (NMB Bab 6) ('KAJ'), pemohon adalah dikehendaki mengemukakan satu petisyen rayuan kepada Mahkamah Tinggi dalam masa 10 hari setelah menerima alasan penghakiman. Walau bagaimanapun, ini tidak dilakukan dan telah menjejaskan kedudukannya. Peguam kepada pemohon telah memohon pelanjutan masa di bawah s 310 KAJ. Timbalan pendakwa raya membantah permohonan ini dan menyatakan bahawa ketidakcekapan seorang peguamcara bukanlah satu alasan yang baik untuk mahkamah memberikan pelanjutan masa. Pemohon telah memberikan alasan yang kuat untuk rayuannya atas merit atau di bawah undang-undang dan selanjutnya menghujahkan bahawa kelalaian peguamcaranya adalah disebabkan masa yang tidak pasti bila mana beliau menukar peguamcaranya. Keterangan di hadapan mahkamah menunjukkan bahawa pada 12 Disember 1996, mahkamah yang dibuat rayuan, yang tidak diberitahu tentang penukaran peguamcara dan bertindak atas rekod lama telah menghantar alasan penghakiman ke alamat peguamcara pemohon yang terdahulu ('peguamcara terdahulu'). Peguamcara baru pemohon ('peguamcara pemohon') hanya menerima alasan penghakiman pada 2 Januari 1997. Pada 31 Januari 1997, peguamcara pemohon memfailkan permohonan ini. Isu adalah sama ada peruntukan-peruntukan s 307(iii) KAJ telah benar-benar dipatuhi.

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Diputuskan, membenarkan permohonan: A

(1) Seksyen 310 telah mengurniakan kepada mahkamah kuasa-kuasa untuk melanjutkan masa untuk memfailkan petisyen rayuan supaya keadilan sebenar dapat dilaksanakan. Kuasa-kuasa itu adalah semata-mata mengikut budi bicara dan tiada peraturan yang tegas dan ketat patut dinyatakan untuk pelaksanaannya melainkan semata-mata untuk tujuan melaksanakan keadilan sebenar. Pada hakikatnya, melainkan untuk melaksanakan keadilan sebenar, ia boleh menjadi satu kesalahan di sisi undang-undang untuk menyekat dan membelenggu budi bicara hakim dalam melaksanakan budi bicaranya di bawah s 310 KAJ (lihat ms 33G–H); *Innocent v PP* [1971] 1 MLJ 294 dan *Veerasingam v PP* [1958] MLJ 76 diikut. B C

(2) Tidak ada peruntukan-peruntukan anggapan yang memperuntukkan kecukupan penyampaian ke atas peguambela pada rekod semata-mata dengan meninggalkan dokumen-dokumen yang relevan di alamat terakhir yang diketahui seperti yang dinyatakan dalam notis rayuan walaupun ia sudah lama (iaitu tidak kira status peguam pada rekod). Dari segi tafsirannya, s 307(iii) menyebut tentang penyampaian kepada 'peguambelanya', tetapi dalam kes ini, peguamcara pemohon yang merupakan 'peguambelanya' tidak dibekalkan dengan dokumen-dokumen itu. D E

Oleh itu, apabila mahkamah menghantar alasan penghakiman kepada peguamcara terdahulu, dan bukan kepada peguamcara pemohon, adalah boleh dipertikaikan bahawa s 307(iv) KAJ telah dipatuhi.

Sekiranya subseksyen di atas tidak dipatuhi, masa dengan itu belum lagi bermula (lihat ms 35E–F dan 38E–F). F

(3) Kelalaian dan ketidakcekapan peguamcara boleh dijadikan alasan untuk pertimbangan oleh hakim apabila melaksanakan budi bicaranya dalam membenarkan atau menolak sesuatu permohonan. Alasan rayuan juga perlu diambil kira (lihat ms 36I dan 38F); *Sinnathamby & Anor v Lee Chooi Ying; Brijkishore & Anor v Lee Chooi Ying* [1987] 1 MLJ 110 dan *Soh Keng Hian v American International Assurance Co Ltd* [1996] 1 MLJ 191 diikut; *Jumari bin Mohamed v PP* [1982] 1 MLJ 282 dan *Masnelan Pakpahan v PP* [1989] 2 MLJ 362 dibeza. G

(4) Setelah menimbangkan perkara-perkara pentadbiran yang perlu dilakukan oleh peguamcara pemohon sebelum memfailkan petisyen itu — terutamanya proses mendapatkan maklumat yang relevan sebelum menyerahkan usul pada 31 Januari 1997 — disokong oleh alasan-alasan lain yang memuaskan, kelewatan 27 hari dalam kes ini tidak boleh dikatakan melampau setelah mengambil kira semua keadaan (lihat ms 38D,G).] H I

Notes

For cases on appeal, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 109–446.

Cases referred to

Edwin Rhodes (1910) 5 Cr App R 35 (refd)
Innocent v PP [1971] 1 MLJ 294 (folld)
Jumari bin Mohamed v PP [1982] 1 MLJ 282 (distd)
Masnelan Pakpahan v PP [1989] 2 MLJ 362 (distd)
PP v Sundaravelu [1967] 1 MLJ 79 (refd)
Sinnathamby & Anor v Lee Chooi Ying; Brijkishore & Anor v Lee Chooi Ying [1987] 1 MLJ 110 (folld)
Soh Keng Hian v American International Assurance Co Ltd [1996] 1 MLJ 191 (folld)
Veerasingam v PP [1958] MLJ 76 (folld)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 307(iii), (iv), (ix), 310
Penal Code (FMS Cap 45) s 376

Karpal Singh (*Karpal Singh & Co*) for the applicant.
Anselm Fernandis (Deputy Public Prosecutor) for the respondent.

Suriyadi J: Ishak bin Hj Shaari, the applicant in this case, was sentenced to 15 years' imprisonment and six strokes of the rotan after being found guilty by the sessions court judge of a charge under s 376 of the Penal Code (FMS Cap 45). In brief, the victim — a 13-year old girl who was a pupil of Sekolah Menengah Indah Tampin — had a counselling appointment on 3 July 1995 with the applicant, who was the religious counsellor of that school. On some pretext, the latter told her to follow him to his house, where she was asked to swear by the Quran not to reveal to anyone whatever was to happen to her; otherwise she would face the wrath of God. The applicant then said that he was suffering from cancer curable only by a virgin maiden. She was requested to strip and thereafter went through the rigmarole of a mock marriage ceremony. He then had sexual intercourse with this girl. The next day, the victim told PW9, one of the witnesses, that the applicant had had sex with her previously. He was subsequently arrested, charged and convicted on 14 October 1996.

Chronologically speaking, a notice of appeal was filed on time by Messrs Azman Razak & Associates, the then firm of solicitors on 23 October 1996. On 12 December 1996, the notes of evidence and the grounds of judgment were received by the same firm of solicitors. In the event the accused was interested in pursuing the appeal on receipt of the grounds of decision, pursuant to s 307(iv) of the Criminal Procedure Code (FMS Cap 6) ('the CPC'), the applicant was to lodge a petition of appeal in triplicate addressed to the High Court within 10 days. The last day was supposed to be 23 December 1996. Unfortunately for the applicant, the petition of appeal was never lodged much to his detriment causing Messrs Karpal Singh & Co to seek an enlargement of time of two weeks before me. The relevant provision resorted to by Mr Karpal Singh was s 310 of the CPC, whereby:

> A judge may, on the application of any person desirous of appealing who may be debarred from so doing upon the ground of his not having observed some formality or some requirement of this Code, permit an appeal upon such terms and with such directions to the Magistrate and to the parties as such Judge shall consider desirable, in order that substantial justice may be done in the matter.

For the purposes of this provision, nothing in s 307(ix) shall be deemed to limit or restrict the court's powers even though the appeal was deemed to have been withdrawn due to the non-lodgment of the petition of appeal within time.

In the course of the hearing, much court time revolved around the inaction of Messrs Azman Razak & Associates, the solicitors who represented the applicant at the sessions court in not lodging the petition of appeal on time. The learned deputy public prosecutor ventilated that a solicitor's incompetence was not good ground for the court to enlarge the time and in the process advanced the case of *Jumari bin Mohamed v PP* [1982] 1 MLJ 282. As in this case, the applicant Jumari bin Mohamed ran out of time due to the tight schedule of the solicitor involved and certain other reasons which revolved around him. Mohd Azmi J (as he then was) dismissed the application as he opined that the reasons put forward were too flimsy and frivolous for him to exercise his discretion under s 310 of the CPC in favour of the applicant. The learned deputy public prosecutor also took great pains to bring to my attention this extraction as said by the learned judge (at p 284):

> In the circumstances, I am of the view that no substantial justice would be done if the extension of time were allowed in this particular case. For the purpose of doing substantial justice, the court must bear in mind that justice must be done not only to the convicted person but also to society at large on whose behalf the public prosecutor acts.

If I were to agree with the submissions of both the parties that the non-lodgment was due to the inadvertence of Messrs Azman Razak & Associates, then this case would have much bearing on the outcome of the application. A thorough analysis of the facts, highlighted by the subsequent paragraphs, will show that there was a misinterpretation of the facts. Additional to this issue, the learned deputy public prosecutor reinforced his case by stating that by not exhibiting a draft petition of appeal, the court should be dissuaded from granting this application as without it the court would be unable to consider the merits of the case. In support of this argument, the case of *Masnelan Pakpahan v PP* [1989] 2 MLJ 362 was brought to my attention. Mohd Dzaiddin J (as he then was) dismissed the application for an enlargement of time founded on the solicitor's sheer inadvertence and the additional ground of the deposition that there were strong grounds of appeal on the merits and in law. Touching on the issue of the proposed document, his Lordship said (at p 363):

> In the present application, it is deposed that there are strong grounds of appeal on the merits and in law and that the failure of the solicitors to file the petition of appeal in time was due to inadvertence. In my judgment, it is insufficient for the deponent to state that he believes there are strong grounds in the appeal on the merits and in law without at least mentioning

> what the grounds are and the law involved. He ought to have exhibited to his affidavit a proposed petition of appeal. Needless to say, I would have been persuaded to grant the application if there was before me materials such as a proposed petition of appeal to enable me to consider the grounds.

Having perused that case, I am minded to say that the facts can be differentiated from that of the present one. In that case, the deponent had omitted material particulars which had left Mohd Dzaiddin J completely in the dark about the whole case. The particulars of the charges — ie the offence for which the applicant was convicted — and the sentence were never mentioned in the enclosed affidavit. It was also deposed that there were strong grounds of appeal on the merits and in law coupled with the inadvertence of the solicitors in not filing the petition on time. On the basis of these grounds, his Lordship opined that he would have been persuaded to grant the application had a proposed petition of appeal been enclosed by the applicant for his consideration. In the present case, Messrs Karpal Singh & Co had adduced vide his affidavits a complete set of the notes of proceedings and had also mentioned the charge and the sentence imposed on the applicant. By looking at the documents adduced by counsel, I could more or less identify the strong grounds of his appeal be it on merits or in law. Moreover, in this case, the issue of sheer inadvertence of the solicitors was not conclusive as the change of solicitors during that relevant period had created a climate of uncertainty which resulted in the inactivity of Messrs Azman Razak & Associates or Messrs Karpal Singh & Co. With these differences at hand, in the circumstances of the case, a draft petition of appeal was not considered by me to be relevant. If I may hastily add, at no point of time in his judgment had Mohd Dzaiddin J held that in every case for an applicant to succeed, it was mandatory to enclose a proposed petition of appeal. In fact, in no uncertain terms regarding the exercise of the discretion which underlined the principle of s 310, his Lordship viewed that in the final analysis the exercise of the discretion depended on the facts and circumstances of each case.

Section 310 has conferred on the court powers to extend the time for filing the petition of appeal in order that substantial justice may be done. The powers are purely discretionary and no hard and fast rule should be laid down for its exercise except for the sole purpose of meting out substantial justice. In fact, if I may go one step further and venture to opine that with the exception of doing substantial justice, it may be legally wrong to curb and fetter the discretion of the judge in the exercise of his discretion under s 310 of the CPC. Perhaps it is timely for me to reproduce the judgment of Raja Azlan Shah J (as His Highness then was) in the case of *PP v Sundaravelu* [1967] 1 MLJ 79, where his Lordship said at pp 79–80:

> This application brings into review the provisions of s 310 of the Criminal Procedure Code (FMS Cap 6). It is clear from the provisions of that section that this court has a discretion whether or not to allow the application, but to my mind, emphasis is laid on the phrase 'in order that substantial justice may be done in the matter'. I think the provisions of this section have been well gone into by the Court of Appeal in *Veerasingam*'s case. There it was said that the section is one of discretion and no hard and fast rules can be

laid down, otherwise it ceases to be a discretion and becomes a rule of law. The definition of substantial justice has been stated by the learned Chief Justice in the following words:

> 'Nor would we attempt any definition of what is substantial justice beyond suggesting in this connection that substantial justice is done when a rightful conviction is upheld and a wrongful one is quashed.'

With that legal scope pervading me, it was thus clearly necessary for me to gauge all the relevant material in order to come within the ambit of s 310. I seek solace from the case of *Innocent v PP* [1971] 1 MLJ 294, where Mohd Azmi J (as he then was) followed the statement of Thomson CJ in the case of *Veerasingam v PP* [1958] MLJ 76 who said at p 79:

> The only fetter which s 310 places upon the exercise of the discretion which it gives to the judge is that it shall be exercised 'in order that substantial justice may be done.' Clearly, to exercise his discretion properly the judge must apply his mind to all the relevant material ... . And then he must exercise his discretion as he sees fit in order that substantial justice may be done in the matter.

With the above legal interpretation in mind, I then proceeded to decipher the relevant materials of the case. The facts surrounding the application for an extension of time at the outset appeared quite straightforward. Unfortunately, that was not so. The notes of proceedings clearly indicated that during the trial, the applicant was represented by Messrs Azman Razak & Associates. After the conviction the notice of appeal as mentioned above was filed by the same firm of solicitors, no doubt pursuant to the instruction of the applicant. One day later, ie on 24 October 1996 as per AJ1 (encl 6), Karpal Singh & Co informed Messrs Azman Razak & Associates of them having been retained to take over conduct of the case (Arrest Case No 61–14–1995). Vide another letter dated 4 November 1996, in the event no objection was forthcoming to this retainer, the relevant documents were requested to be forwarded to the new firm of solicitors as soon as possible. Promptly, the next day, ie on 5 November 1996 as per AJ2 (encl 6), Messrs Azman Razak & Associates — aside from indicating their agreement to that retention — also enclosed a copy of the notice of appeal, a copy of the police report No 914/95 and a copy of the applicant's cautioned statement. On that date itself, there was still no necessity for the petition of appeal to be submitted by the applicant as the grounds of decision had not been supplied either to him personally or to his advocates by the courts. On 12 December 1996, the grounds of decision were sent to Messrs Azman Razak & Associates as confirmed by KS2 (encl 2) indicating that it was done pursuant to s 307(iii) of the CPC. By then, when the documents were sent to the latter, their services had been terminated as agreed by the deputy public prosecutor and Mr Karpal Singh. As opposed to that in reality, the advocates of the applicant were from the firm of Messrs Karpal Singh & Co. As no one had informed the court of the change of solicitors, the court — no doubt acting on its old records — had merely taken that reasonable course of action of sending the documents to the address supplied in the notice of appeal. As far as the court was concerned, the countdown began on 12 December 1996. The relevant question that provoked my mind was whether the provisions of

A s 307(iii) had been strictly complied with when that administrative action was undertaken. This subsection reads:

> When a notice of appeal has been lodged the Court appealed from shall make a signed copy of the grounds of decision in the case and cause the same to be *served upon the appellant or his advocate* by leaving the said copy
B at the address mentioned in the notice of appeal or by posting it by registered post addressed to the appellant at the said address. (Emphasis added.)

Perusing this provision, it is crystal clear that for s 307(iv) to be operative, the grounds of decision must have been posted or served on the appellant
C (in this case, the applicant), or served on his advocates. It could not be denied that in this instant case, no grounds of decision or notes of proceedings were served, posted to the applicant or served on his advocates — namely, Messrs Karpal Singh & Co — as the documents had been diverted to Messrs Azman Razak & Associates. I was perturbed by this scenario as a cloud of uncertainty prevailed over the matter. For all intents
D and purposes as agreed by all parties, Messrs Azman Razak & Associates were no more the active advocates but yet were served. The court was blameless as it had acted pursuant to the address supplied in the notice of appeal. So, was this service to Messrs Azman Razak & Associates whose services had been terminated good and sufficient to fulfill the requirements of s 307(iii)? Scrutinizing the Code, I found no deeming provisions (similar
E to s 307(ix) of the CPC) that provided sufficiency of service on the advocates on record merely by leaving the relevant documents at the last known address as provided in the notice of appeal despite its outdatedness (meaning regardless of the status of the solicitors on record). Construction wise, s 307(iii) speaks of service to 'his advocates', but in this case, Messrs Karpal
F Singh & Co who were 'his advocates' were not supplied with the documents.

This unexpected but practical problem, perhaps not anticipated by legal drafters, had crystallized before me and I was in no mood to ignore it or take it lightly. As all provisions in criminal proceedings must be strictly complied with and adhered to, bearing in mind that the liberty of
G a person may be at stake, this grey area which had imposed itself on my sphere of discretion certainly was another factor which deserved my utmost attention.

As if these legal niceties were insufficient to put the applicant in hot soup, much to his chagrin, Messrs Azman Razak & Associates took their own sweet time and only sent the grounds of decision to Messrs Karpal
H Singh & Co on 31 November 1996. The latter received them on 2 January 1997. By the time the documents were received, for the purposes of filing the petition of appeal, time had lapsed by 10 days.

Certainly by looking at the available evidence, I could conclude that as the services of Messrs Azman Razak & Associates had been terminated, there was thus no duty imposed on them to be concerned regarding the
I interest of the applicant, hence the lackadaisical attitude. With that finding, the incompetency and inadvertence — or for that matter the non-activity of the discarded legal firm — had now become academic. Perhaps morally, it was encumbent upon them to inform the court of the change of solicitors or to send the grounds of decision promptly to Messrs Karpal Singh & Co

but unfortunately this idealistic and high moral value was a rare commodity. Why the court was not informed of the change of solicitors was also not clear from the notes of proceedings.

Regardless of my above findings, Messrs Azman Razak & Associates volunteered per the affidavit of Azman bin Hj Jaafar (encl 6) to explain the reason of that delay in delivering the documents. He affirmed that on that relevant period he was away on long leave. Also by reason of the relevant file having been considered redundant and closed, the legal clerk took little notice of the matter until the firm received a call from the courts regarding the petition of appeal. The solicitor justified the failure of filing the petition of appeal by explaining that as Messrs Karpal Singh & Co had been retained, the responsibility had thus shifted to them. Whether Messrs Azman Razak & Associates had acted reasonably or otherwise, they considered themselves as having been exonerated from all blame by reason of the intercession of a new firm. Despite that belief, nothing could detract from the court's mind that in the process the applicant's constitutional rights had been compromised and no amount of compensation, explanation or whatever factor could possibly replace the probable loss of 15 fruitful years merely on the basis of some unexpected factor over which the applicant was blameless and over which he had no control.

On the remote possibility that the incompetence and the inadvertence of solicitors caused the delay in the lodgment of the petition of appeal, it became encumbent upon me to consider the legal poser whether that predicament could be a factor for me to consider. In answer to this question, a certain amount of research was required and I found that the legal opinions of judges and principles enunciated in civil and criminal cases were highly illuminating. At the extreme end was the case of *Jumari bin Mohamed v PP*, which was supplied by the prosecution principally to persuade me to reject the application based on the factor of inadvertence. Having perused that case, I must with respect disagree with the interpretation of the deputy public prosecutor as the case ought to be read in totality and not merely to extract phrases which when taken out of context could discolour the opinion of Mohd Azmi J. Suffice for me to say that His Lordship rejected the application after having considered all the circumstances of the case and not merely on the inadvertence of the solicitors concerned. In clear language, he said (at p 284):

> In my view, an extension of time to file a petition of appeal or to amend such petition out of time should not be granted as a matter of course.
>
> Having regard to all the circumstances of this particular case and in exercise of the discretion conferred by s 310 of the Criminal Procedure Code, I dismiss this application.

In contra distinction for civil cases, the courts are now more receptive to consider the factor of mistake or the inadvertence of a solicitor as one of the considerations. In *Sinnathamby & Anor v Lee Chooi Ying; Brijkishore & Anor v Lee Chooi Ying* [1987] 1 MLJ 110, Mohd Azmi SCJ (now FCJ) had this to say on this point at p 112H–I:

> Under r 13 of the repealed Federal Court (Civil Appeals) (Transitional) Rules 1963, 'special leave' of the full court was required to bring an appeal

A out of time, but under the present r 56 of the Rules of the Supreme Court 1980, the word 'special' has been omitted, and because of this change in the law which requires only ordinary leave, it is argued that the mistake of a legal adviser is no longer a ground for refusing an application for extension of time to appeal. In my view, this is not so, for the effect of the change in the law merely widens the court's unfettered discretion under r 56. In B exercising its discretion, the court would, inter alia, consider the reason for the delay, the length of the delay and likelihood of prejudice to the successful party in the court below. In view of the change in the law which no longer requires 'special leave', where the mistake of a legal adviser is advanced as the reason for the delay, the court is now free to consider it on its merits in the same manner that the court would exercise its discretion in other C cases ... . In *Gatti v Shoesmith* [1939] 3 All ER 916, the Court of Appeal allowed extension of time where the delay was only a matter of a few days and the appellants' solicitor, within time, had informed the respondent's solicitors by letter of their intention to appeal. On the facts of that case, although the notice of appeal was not served within the strict time, due to the appellants' solicitor's misunderstanding of the law, the court exercised D its discretion in granting leave to appeal out of time. But *Gatti*'s case is no authority for the proposition that because of the change in the law from special to ordinary leave, the court has no more discretion to refuse an application under r 56 where the delay is caused by the mistake of a legal adviser. This is made clear in the judgment of Sir Wilfrid Greene MR at p 919 where he said:

E > 'On consideration of the whole matter, in my opinion under the rule as it now stands, the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser may be a sufficient cause to justify the court in exercising its discretion. I say "may be" because it is not to be thought that it will necessarily be exercised in every set of facts.'

F This enlightened view was later followed by the Court of Appeal in the case of *Soh Keng Hian v American International Assurance Co Ltd* [1996] 1 MLJ 191 where at pp 194–195, Gopal Sri Ram JCA said:

> It is axiomatic that this court is seized of a wide discretion to extend time in proper and deserving cases. But it is not an unprincipled discretion. There G must be some relevant evidential material made available to us before we may exercise discretion.
>
> Further, we are fully conscious of the difference between the language of the Federal Court (Civil Appeals) (Transitional) Rules 1963 and the Rules of the Court of Appeal 1994. The former required an appellant to obtain special leave to extend time to either file or to serve a notice of H appeal. The latter has no such requirement. This difference in language has an important consequence. Whereas in an application under the former, the mistake of a solicitor or his clerk was no excuse (*Re Coles & Ravenshear* [1907] 1 KB 1), it is a factor which the court may now take into account when deciding whether to grant an extension of time under the latter (*Sinnathamby & Anor v Lee Chooi Ying* [1987] 1 MLJ 110).

I With the wisdom of the above two civil cases available for my consideration, it would appear unusual if the same factor of the solicitor's inadvertence could not be applied for criminal cases. In fact, there is more reason that this factor should be considered in order that substantial justice may be done as the liberty of a person is no mean commodity. Moreover, in

criminal cases whenever a doubt arises, the benefit of that doubt has consistently tilted to the accused. To conclude on this point, on the possibility that there was inadvertence on the part of the solicitors who handled this matter and through no fault of the applicant he had suffered, I believe the court should not be prevented from or fettered in considering it.

The next relevant issue that was required of me to consider was whether the delay of the 27 days could be construed as inordinate. On this point, I would like to refer to the remarks of the Lord Chief Justice in the case of *Edwin Rhodes* (1910) 5 Cr App R at p 35 where his Lordship said:

> Ten days is fixed by the Act with power, except in cases involving death, to extend the time. Applications out of time are becoming more numerous. A short delay may be disregarded by the court if it thinks fit, but where a substantial interval of time — a month or more — elapses, it must not be taken for granted that an extension of time will be allowed as a matter of course without satisfactory reasons.

Having considered the administrative gymnastics that Mr Karpal Singh had to go through prior to filing the petition — particularly the process of obtaining the relevant information before submitting the motion on 31 January 1997 — supported by other satisfactory reasons, I concluded that no inordinate delay prevailed in this case.

To wind up the judgment based on the available material, I concluded that:

(i) when the court sent the grounds of decision to Messrs Azman Razak & Associates instead of Messrs Karpal Singh & Co it was not conclusive that s 307(iii) of the CPC had been complied with;

(ii) in the event the above subsection had not been complied with, time thus had not begun to run;

(iii) the inadvertence and incompetence of solicitors could be a ground of consideration when exercising my discretion in allowing or disallowing the present application;

(iv) it is not in every case that a proposed petition of appeal should be enclosed; and

(v) the supposed delay of 27 days in this case after considering all the circumstances could not be construed as inordinate.

On the above reasons, I allowed the application for an enlargement of time whereby the petition was to be filed within two weeks from the date of decision.

Application allowed.

Reported by Zahid Taib